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IN THE

Supreme Court of the United States

No. 237 October Term, 1944.

FRED E. HUMMEL, Trustee for Monark Motor Freight System, Inc., Bankrupt,

Petitioner,

vs.

EMIL HRABAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

HENRY I. QUINN,
Counsel for Petitioner,
Woodward Building,
Washington, D. C.

WARD C. HENRY,
Of Counsel,
1724 Lincoln-Liberty Bldg.,
Philadelphia, Pa.

Martin & Lyle, 302 Penfield Bldg., Phila., Pa.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. October Term, 1944.

FRED E. HUMMEL, Trustee for Monark Motor Freight System, Inc., Bankrupt,

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vs.

EMIL HRABAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Fred E. Hummel, Trustee for Monark Motor Freight System, Inc., Bankrupt, hereby applies for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit entered on the eighth day of May, 1944.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case was based upon a claim for damages for personal injuries alleged to have been received by the plaintiff when he was struck by a truck owned and operated by the Monark Motor Freight System, Inc., while he was crossing a street in the City of Philadelphia. When the case was first assigned for trial, defendant asked for a continuance because the driver of the truck was in the military service of the United States. This application was granted, but defendant was informed that it must proceed to take the deposition of the driver so that the case could be tried when next it appeared upon the list. The deposition of the driver was taken pursuant to such order. When the case next appeared upon the preliminary list for trial the application of the defendant for a continuance was denied and the case was placed on the list for trial. When the case was assigned for trial, the application of the defendant was renewed but denied by the trial Judge and defendant was compelled to proceed with the trial. A verdict was returned in favor of the plaintiff in the sum of $12,500. Defendant's application for a new trial alleging, among other reasons, that it had been prejudiced by being compelled to go to trial without the opportunity of securing the personal attendance of its driver was denied. For reasons stated by the trial Judge in his opinion the verdict was reduced to $9,500.,

for which amount judgment was entered. An appeal was duly taken to the United States Circuit Court of Appeals for the Third Circuit. That Court affirmed the judgment upon the opinion of the trial Judge.

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, being Section 347, Title 28, U. S. C. A., p. 359. Federal jurisdiction is based on diversity of citizenship. The complaint shows that the petitioner, who was the defendant below, is a citizen of Illinois, and that the respondent, the plaintiff below, is a citizen of Pennsylvania, and that the amount involved, exclusive of interest and costs, exceeds $3,000.

C.

QUESTION PRESENTED.

In view of the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, ought a defendant to be compelled to go to trial in the absence of the employe of the defendant driving its truck which was involved in the ac-

cident, when the presence of such driver cannot be secured because he is in the military service of the United States and when he is the only witness as to the facts of the accident with the exception of the plaintiff?

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

2. The Circuit Court of Appeals has decided an important question of law contrary to the only decision of a State Supreme Court involving that question:

ILDERTON VS. CHARLESTON CONSOL. RAILWAY AND LIGHTING CO., 113 S. C. 91, 101 S. E. 282.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein the full and complete transcript of the record and all proceedings in said cause entitled Emil Hrabak, Plaintiff vs. Fred E. Hummel, Trustee for Monark Motor Freight System, Inc., Bankrupt, Defendant-Appellant, docketed as No. 8572, October Term, 1943, and that said judgment of the Circuit Court of Appeals for the Third Circuit be re-

versed and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

And your petitioner will ever pray.

FRED E. HUMMEL,
Trustee for Monark Motor Freight System, Inc., Bankrupt,
By HENRY I. QUINN,
Counsel for Petitioner.

WARD C. HENRY,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the trial Court is not officially reported, but appears in the Record at pages 229a to 237a. The opinion of the Circuit Court of Appeals is not yet officially reported, but appears in the Record at page 243.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Feb-

ruary 13, 1925, being Section 347, Title 28, U. S. C. A., p. 359. Federal jurisdiction is based on diversity of citizenship. The complaint shows that the petitioner, who was the defendant below, is a citizen of Illinois, and that the respondent, the plaintiff below, is a citizen of Pennsylvania, and that the amount involved, exclusive of interest and costs, exceeds $3,000.

III.

STATEMENT OF THE CASE.

In the petition, under the heading "Summary Statement of the Matter Involved," is a full statement of the case so far as material to the consideration of the question presented and in the interest of brevity the statement is not here repeated. Reference is made to pp. 12a to 15a of the Record.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the lower Court upon the opinion of Judge Bard of that Court, holding that the defendant-petitioner was not entitled to a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 because of the absence of its driver who was in the military service of the United States and for that reason could not be produced at the trial.

V.

ARGUMENT.

(A) THE DRIVER OF THE TRUCK, WILLIAM GINTHER, WAS PREJUDICED BY THE REFUSAL OF THE COURT BELOW TO CONTINUE THE TRIAL OF THE CASE UNDER THE PROVISIONS OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.

There are two sections of the Soldiers' and Sailors' Civil Relief Act of 1940 which we believe apply to the situation which exists in this case. They are as follows:

> "*Purpose of Act; suspension of enforcement of civil liabilities.*
>
> In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force. Oct. 17, 1940, c. 888, §100, 54 Stat. 1179." 50 USCA §510.

"*Protection of persons secondarily liable.*

(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended." Oct. 17, 1940, c. 888, §103, 54 Stat. 1179. 50 USCA §513.

Undoubtedly, if the driver had been joined as a defendant the trial of the case should have been postponed until the termination of hostilities would result in the return of such defendant to civil life. The same rule ought to be applied if it appears that the driver might or could be held secondarily liable in case there should be a verdict for the defendant in a case brought against the owner of the truck who was also the employer of the person engaged in military service.

"A servant is liable to his master for damages which the master has been compelled to pay to third persons because of the negligent or other wrongful act of the servant, where the master is not himself at fault."

39 *Corpus Juris Sec.* 1514, pp. 1313, 1314.

"It is a widely recognized rule that an employee is liable directly to his employer for whatever injury or damaged is occasioned by the employee's failure to exercise reasonable care and diligence or by reason of his misconduct, whether such damage is direct to the

person or property of the employer or is brought about by compensation which the latter has been obliged to make to some third person for injuries sustained by the latter on account of the employee's act."

35 *Am. Jur. Sec.* 101, p. 430.

Since the relation of master and servant existed between the defendant and its driver the return of a verdict against the defendant resulted in the creation of liability on the part of the driver for such verdict. Under the provisions of the second paragraph of the Statute as set out above, it would seem that there should have been a temporary suspension of legal proceedings and transactions which may prejudice the civil rights of a person in the military service.

(B) THE DEFENDANT WAS PREJUDICED BY THE REFUSAL OF THE COURT BELOW TO CONTINUE THE TRIAL OF THE CASE UNDER THE PROVISIONS OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.

In support of this point, we direct the attention of the Court to the case of ILDERTON VS. CHARLESTON CONSOLIDATED RAILWAY & LIGHTING CO., 101 S. E. 282, 113 S. C. 91. In that case the Supreme Court of the State of South Carolina held that it was error not to continue a case against the defendant railway company on account of the absence in the army of the only witness for defendant, the employee of defendant, whom it was claimed was negligent, and so caused injury to the plaintiff. The court held the lower court should have granted the application of defendant for continuance until the employee of defendant returned, and held that the employee's rights might be affected by the judgment, since, if judgment was

rendered against the defendant, the defendant could sue the employee. The plaintiff's cause of action was based on the negligence of the employee and consequently the employee would be liable over to the defendant, and on that account the case came under the Soldiers' and Sailors' Act of March 8, 1918, which provided for the temporary suspension of legal proceedings "which may prejudice the civil rights" of soldiers and sailors during the war.

This is the only case that we have been able to find which seems to us to involve the question which we have in this case. The opinion of the District Court adopted by the Circuit Court of Appeals attempts to distinguish that case because the defendant there was obliged to present its defense without the testimony of the motorman and in this case the defendant was given the opportunity to secure the deposition of its driver. Judge Bard dismisses the claim of prejudice to the defendant for that reason. In commenting on the claim of prejudice, Judge Bard calls attention to the fact that no appeal was made by Ginther, the driver, for the protection of his own rights in this respect. It should be noted that in the ILDERTON case, supra, the appeal was made by the defendant-employer, and not by the employe.

It would seem that the final determination of this question would rest on whether the Court in interpreting the Soldiers' and Sailors' Civil Relief Act of 1940 should adopt a liberal construction of that Act in endeavoring to protect the rights of a man in the military service of his country, or whether the Act should be interpreted from the standpoint of the plaintiff in a suit, and an attempt made to protect him. Judge Bard showed that he was influenced somewhat in his decision by the thought of the prejudice which might result to the plaintiff if the trial of this case should be postponed under the provisions of the Act. We respectfully submit that any such consideration ought not to be

involved in the interpretation of such an Act. The refusal of the defendant's motion for a continuance amounted to an abuse of discretion by the lower Court whose ruling was adopted by the Circuit Court of Appeals.

In order that the rights of all parties involved in litigation similar in character to this case may be determined, we ask that a writ of certiorari be granted.

Respectfully submitted,

HENRY I. QUINN,
Counsel for Petitioner.

WARD C. HENRY,
Of Counsel.

Office - Supreme Court, U. S.
FILED
AUG 4 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 237. OCTOBER TERM, 1944.

FRED E. HUMMEL, Trustee for Monark Motor Freight System, Inc., Bankrupt,
Petitioner,

vs.

EMIL HRABAK,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI.

PHILIP A. CAMPBELL,
Counsel for Respondent,
1502 Finance Building,
Philadelphia, Pa.

VICTOR FREY,
Of Counsel,
1502 Finance Building,
Philadelphia, Pa.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn. Race 6067.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The Respondent, EMIL HRABAK, submits this Answer to the Petition of Fred E. Hummel, Trustee, for a Writ of Certiorari, to review a decision of the Circuit Court of Appeals for the Third Circuit entered on the 8th day of May, 1944.

A.

ADDITIONAL STATEMENT OF FACTS IN THE MATTER INVOLVED.

The Petitioner failed to set forth in his Summary Statement of The Matter Involved, the following facts:

That pursuant to the Order made on October 20th, 1942, by the Honorable William H. Fitzpatrick, sitting in the District Court for the Eastern District of Pennsylvania, that as a condition to granting Defendant's motion for continuance, the Defendant should take the driver's depositions, the Petitioner did take the Depositions of the driver of the truck on the 5th day of November, 1942, at which time the said driver was located at Rockford, Illinois.

That these Depositions were read to the Jury at the trial by the Petitioner's attorney. They appear in the record at page 179a.

There is no proof in the record that William Ginther, the driver, could not have been produced at the trial even if he was in Service. There is only a bare statement of counsel for the defendant that Mr. Ginther was then in the armed services of the United States. He may have been discharged after the date of his deposition. The case was tried Feb. 16th, 1943.

The record shows that no attempt was made by the Petitioner, as defendant in the suit, to bring in William Ginther, the driver, as an additional defendant, under sci. fa. proceedings under the statutory scire facias practice in the State of Pennsylvania where the case was tried.

There never has been any action brought by the Plaintiff against William Ginther, and, since the accident happened September 22, 1941, any such action is now barred by the Statute of Limitations of two years in Pennsylvania.

The original defendant, who was the employer of Ginther, is in bankruptcy in the District Court of the United States for the Northern District of Illinois.

The record will show that after the Circuit Court of Appeals for the Third Circuit affirmed the judgment entered in favor of the plaintiff, the present Petitioner filed a petition in that Court for a re-argument (which was not allowed) basing his petition upon the allegation, among others, that injustice might be done to Ginther, because he could eventually be made to pay the verdict.

The Respondent herein filed an answer in the Circuit Court of Appeals setting forth, in effect, that the Defendant in the suit, the present Petitioner, was protected by an indemnity liability insurance policy in an amount exceeding the verdict, covering both the employer and Ginther the employee, and that, therefore, even if Ginther could be compelled to pay the verdict in this case, eventually the insurance company, which is the real party in interest here, would be obliged to indemnify and reimburse William Ginther, and that the effect of granting the present Petitioner's prayer would result merely in a circuity of action and that the Soldiers' and Sailors' Relief Acts of Congress should not, therefore, be applied to such a situation.

ARGUMENT.

The Soldiers' and Sailors' Civil Relief Act of 1940, as amended in 1942, Act of October 17th, 1940, C 888, 54 Stat. 1178, 50 U. S. C. A., App. Sec. 501, et seq. is primarily intended for the protection of men and women in military service against civil contractual liability.

It was certainly not intended to be a shield for a bankrupt defendant to use in order to prevent an injured plaintiff's trial simply because a witness, and not a party, is in military service, especially where the trial has been once continued until the deposition of that witness was secured.

It is important to note that Ginther had neither by himself, nor by his counsel, asked for a stay; rather was the continuance or stay sought by the counsel for the defendant, now appellant.

The appellant relies solely on the case of ILDERTON vs. CHARLESTON CONSOLIDATED RAILWAY & LIGHTING CO., 101 S. E. 282; 113 S. C. 91, and cites no other case.

This case was decided in the Supreme Court of South Carolina in 1919 and differs in so many ways from the case at bar that it cannot be controlling relative thereto. For example, in the ILDERTON case:

1. The defendant had endeavored to secure the driver's deposition and had not been able to do so.
2. The absent driver was defendant's chief, and practically its only, witness.
3. The absent driver would have been available to testify at the next term of court.

In the present HRABAK case:

1. The defendant had been granted a continuance for the purpose of securing the driver's testimony,

and the driver's deposition *was used by the defendant* now appellant, at the trial.

2. The defendant, now appellant, had other witnesses beside its driver.

3. There is nothing in the record to indicate when, if ever, the driver would have been available to testify.

The application of the remedies which the Soldiers' and Sailors' Civil Relief Act affords is left largely to the discretion of the trial court, and in the absence of a showing of an abuse of discretion, the decisions of such courts will not be disturbed: 130 AMERICAN LAW REPORTS ANNOTATED 784.

This principle was again applied in the case of SWIDERSKI vs. MOODENBAUGH, decided March 23, 1942, in the District Court of Oregon and reported in 44 Federal Supplement at page 687. This was a personal injury action arising out of an automobile collision. A motion to postpone further proceedings was overruled even though the defendant himself was actually in the military service. The Court said in part as follows:

> "*The court has discretion under the statute.* Congress has declared the public policy relating to persons in military service. *No absolute bar has been erected to such proceedings.* The necessity is thus imposed of acting with sound judgment. Two perils present themselves. The court must avoid injury to a soldier who is devoting himself to the service of country. *The court must prevent use of this shield for the protection of others not so devoted.* Here plaintiff claims serious injury. His counsel has stated without contradiction that defendant is protected by a casualty insurance policy up to five thousand dollars and has agreed to limit recovery to that amount.

This seems a proper factor for the court to consider in the exercise of discretion. *The Act expressly allows an action to proceed against other defendants, although a soldier is also sued. Title 50 U. S. C. A. Appendix, Sec. 524. . . .*

"It is true that the insurer is not technically a party to the action. But the judgment, if there is any, will ultimately be paid by it. *If it were sued directly, it would have no defense based upon the fact that witnesses were in the military service. Certainly, no court would be required to grant continuance where the cause could have been tried long before such contingencies arose.*" (Italics ours)

See also Badger v. Township, 348 Penna. p. 551, opinion by Mr. Justice Horace Stern.

The Respondent, therefore, respectfully prays that your Honorable Court will deny the prayer of the Petitioner herein at the cost of the Petitioner.

And your Petitioner will ever pray.

PHILIP A. CAMPBELL,
Counsel for Respondent,
1502 Finance Bldg.,
Phila., 2, Pa.

VICTOR FREY,
Of Counsel,
1502 Finance Bldg.,
Phila., 2, Pa.